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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN, individually and as next friends of WILLIAM BOOHER, Jr.,

Petitioners,

v.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

PETITION FOR A WRIT OF CERTIORARI

DAVID H. BERG
Counsel of Record
Berg and Androphy
3704 Travis
Houston, TX 77002
713-524-5622

PHILIP D. ZELIKOW
79 J.F.K. Street
Cambridge, MA 02138
Counsel for Petitioners

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTION PRESENTED

Whether the First Amendment can confer absolute protection from civil liability as a matter of law for both the disclosure and the broadcast of painful, intimate information where the information was not publicly available or a matter of public record, the victim was not a public figure, the private discloser had pledged confidentiality, and the broadcaster acquired the information without the victim's consent.

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PETITION FOR A WRIT OF CERTIORARI

Nancy Anonsen, Michael Anonsen, and William Booher, Jr. respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas in this case.

OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, 5a - 18a) is reported at 857 S.W.2d 700. The trial court order granting summary judgment (App. A, *infra*, 1a-2a) and the Supreme Court of Texas denial of the application for a writ of error (App. C, *infra*, 19a-20a) and order refusing rehearing on its earlier denial (App. C, *infra*, 22a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 3, 1993. Petitioners' application for a writ of error to the Supreme Court of Texas was denied on November 17, 1993. Petitioners' motion for rehearing was denied on January 5, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, that "Congress shall make no law ... abridging the freedom of speech, or of the press...."

The Fourteenth Amendment to the Constitution provides, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Relevant provisions of former sections of the Arkansas Code are reproduced in Appendix C, page 23a-24a.

STATEMENT

A. The Invasion of Privacy

The essential facts of the case are undisputed. Also, since the case arose from appeal of a summary judgment, the Texas court acknowledged that all of petitioners' factual assertions must be accepted as true. 857 S.W.2d at 702.

On January 5, 1989 respondent Miriam Booher (hereinafter referred to as Booher) appeared on the

"Donahue" television show hosted by respondent Phil Donahue and produced by respondent Jose Pretlow for their corporate employers, respondents Multimedia Entertainment, Inc. and Multimedia, Inc. For convenience, all the respondents associated with the show will be referred to in this petition as "Donahue." Respondent KTRK, Inc. d/b/a KTRK-TV was the local station which carried the show in the Houston-Galveston area.

The show's topic for the day was "Forbidden Pregnancies." Booher did not appear to tell about her own forbidden pregnancy. Instead she recounted what happened to her daughter. Her daughter, petitioner Nancy Anonsen, was raped by her stepfather, Booher's husband, seventeen years earlier, when the girl was only eleven years old. Nancy had borne a child from this incest. Booher had helped conceal the crime.

This incestuous rape occurred in 1972. Booher, though she soon learned the truth of what happened to her daughter, never reported the matter to authorities. She remained married to her husband and raised her daughter's child as if he was an adopted half-brother. The daughter and the child left the household after the daughter came of age. The daughter still cares for her son and represents his interests in this proceeding.

In 1988 Booher's husband left her and filed for divorce. Angry, Booher decided to use the crime her husband had committed against her daughter as a way of getting back at her husband. Greed was also a factor. As the Texas court observed, "Booher was motivated by revenge and the desire to sell a book about her life." 857 S.W.2d at 702. Once again, her daughter was the pawn. So Booher wrote a letter about the rape of her daughter and sent it to four television shows: Oprah; Morton Downey, Jr.; Geraldo; and Donahue. Only Donahue's producer replied.

Donahue admitted that at the time of his show on "Forbidden Pregnancies" he was sensationalizing his programs because of the competition for ratings. (Tr. 120, 226, 230-33). Though Booher bragged she could get others in her family to appear, this was false. It was clear well before air time that in fact only Booher would appear. No one associated with Donahue thought this odd or attempted to contact anyone except Booher.

Booher appeared on Donahue without disguise and used her own full name as she told what had happened to her daughter. From time to time the caption "Daughter Had Husband's Baby" appeared on the screen as Booher spoke. By disclosing her own identity, Booher effectively and immediately disclosed the names of her daughter and her daughter's child from the rape. 857 S.W.2d at 702.

The consequences for Anonsen and her son were instantaneous and severe. Once more the victim of parental abuse, the daughter first learned of the broadcast from her husband. She was "embarrassed, humiliated, paranoid and couldn't function in any way" after the show aired. (Tr. 1273). Her marriage broke apart and, despite marital counseling, she and her husband divorced six months after the broadcast. Her son, then 16 years old, began experiencing harassment from his high school classmates, who mocked him as a "bastard." He had to transfer to another school to escape the harassment. Both mother and son began receiving medical treatment for the trauma. (Tr. 1270, 1352).

The broadcast was so traumatic because Booher was disclosing a closely held family secret. Petitioners testified that the rape had been kept secret from everyone except a few friends and family members. (Tr. 217, 218, 1262). The matter was never a part of any public record. The biological child of the rape, William Booher, Jr., had only been told the truth in 1987, when he was fourteen years old.

Miriam Booher, by disclosing the story on national television, violated her own repeated and express pledges of confidentiality to petitioners. When Booher told Nancy she was talking to Donahue, her daughter pleaded with her not to do it. "Too many people will get hurt." Booher agreed not to appear. Booher then assured her daughter she had called Donahue's producer to tell him she, Booher, would not go on the show. (Tr. 1261). Her assurance was untrue.

Donahue, in broadcasting Booher's disclosure, violated his own customary practices. Donahue, designated by respondents as an expert on his industry, said he often concealed identities to protect people. Identities of callers were concealed every day. Some guests are disguised, and can still move audiences to tears. (Tr. 102-04, 133). Donahue said he had done many shows about rape. But he said he had never revealed the identity of a rape victim without first obtaining the victim's permission. (Tr. 57, 258). Such a failure to obtain the victim's permission would, he conceded, amount to an invasion of privacy. (Tr. 259).

Respondents concede that neither Donahue nor his staff obtained or attempted to obtain petitioners' consent for the acquisition of the information from Booher or their broadcast of her disclosures. They never tried to contact petitioners at all. Nor was any attempt made to conceal Booher's identity in order to protect petitioners.

Petitioners sued Booher, Donahue, Donahue's producer, and Donahue's corporate employers for invasion of privacy, under the common law tort for public disclosure of private facts. This tort has long been accepted in Texas and many other states. Petitioners also sued for the intentional infliction of emotional distress.

B. Proceedings Below

After suit was brought and depositions taken, respondents moved for summary judgment under the First

Amendment and on state law grounds. The 56th district court for Galveston County, Texas, granted the motion. Petitioners appealed to the court of appeals. The court of appeals affirmed the judgment, relying solely on its analysis of the federal claim under the First Amendment, as applied to the states under the Fourteenth. Petitioners applied for a writ of error from the Supreme Court of Texas. The application was denied without any opinion on the merits of the case. Motion for rehearing to the Supreme Court was denied. Since it was the highest state court which actually ruled on the merits, this petition for certiorari seeks relief from the ruling of the court of appeals. *Faretta v. California*, 422 U.S. 806, 812 (1975).

C. Federal Question Was Basis for State Court Decision

The court of appeals held that while the motions had addressed a variety of state law issues, the appeal would be disposed of based on the court's analysis of respondents' claim of First Amendment protection. 857 S.W.2d at 703. No other issues were considered. No state constitutional provisions were invoked. The Texas Supreme Court gave no reason for refusing discretionary review. Since the state court has held that a federal question is properly before it and has proceeded to consider and dispose of that issue, this Court's concern about the proper raising of the federal question in the state courts has disappeared. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979).

REASONS FOR GRANTING THE PETITION

I. THE FIRST AMENDMENT PRIVILEGE UPHELD IN TEXAS IS ABSOLUTE, IN CONFLICT WITH THIS COURT'S HOLDING IN *FLORIDA STAR v. B.J.F.*

The Texas court has eliminated the tort of public disclosure of private facts by erroneously granting the discloser an unlimited First Amendment right and then equating the broadcaster's rights with those of the discloser. This Court's narrower test for balancing First Amendment interests, laid out in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), was not applied by the Texas court.

A. The Texas Court's Language Is Unlimited.

1. The court predicated its holding for both Donahue and Booher on Booher's unlimited First Amendment right to disclose.

The Texas court's ruling hinges on the belief that the decisive issue is Booher's right to disclose. The question, it said, is "whether a person's right to make public the most private details of their own life is limited when the information also reveals painful intimacies of other persons. We find that it is not." The discloser's right is therefore unlimited, so long as the disclosure has to do with the details of the discloser's life.

2. But Booher's speech alone, without Donahue's publication of it, had no First Amendment protection

(a) Booher was not sued just for revealing her identity

Since the public is interested in rape, incest, and as Donahue's show put it, "forbidden pregnancies," the Texas court thought the only other First Amendment question was whether Booher could reveal her own identity. 857 S.W.2d at 704. Yet if Booher had gone on the Donahue show just to say her name, she would not have been allowed on the air

and there would have been no lawsuit. To be liable, Booher had to both identify herself, thereby identifying her daughter and her daughter's son, *and* she had to disclose that her daughter had been the victim of her husband's abuse, abuse to which she was a criminal accessory. Had she only done one of these two things, without the other, she would not have invaded petitioners' privacy and inflicted emotional distress. So while Booher may have a right to say her name, the question remains whether she had a constitutional right to link her identity to the account of how her daughter was raped.

(b) private speech and the law of torts

The Texas court relied completely on Booher's right to tell about events in which she was involved. This is, in essence, a contention that the First Amendment immunizes speech from civil liability if the speaker is recounting a personal experience. This is a startling premise, since lawsuits throughout the country have long held individuals liable if their private speech breaches a legal duty to another. This certainly includes speech about their own experiences, as in most confidentiality cases. In *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) this Court held that an attorney could be disciplined for extrajudicial statements to the press, above and beyond other obligations of confidentiality. 111 S.Ct. at 2733-36. Businessmen are barred from disclosing trade secrets they learned in their employment. Parties to lawsuits can be barred from disclosing the terms of a settlement. Hospitals can be held liable for improperly revealing the names of individuals who have tested HIV-positive.

So the First Amendment has never provided unlimited protection if the speech violated a common law legal duty. The key issue in this case is whether Booher owed such a duty to petitioners. But that is an issue for state law and for

a jury; its resolution is not dictated as a matter of law by the First Amendment.

The distinction between protected speech and private speech is not new to this Court. Though the holding of the Texas court in this case is a novel one, the Court has dealt with claims that public employees have been dismissed for their speech. In such cases the Court has distinguished between public and private speech, pointing out that the First Amendment's goal is "the full protection of speech upon issues of public concern," such as the conduct of government agencies or public persons. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

In sum, Booher and Donahue actually have quite different positions under the First Amendment. Booher, as a private person handing out newsletters about her daughter, would have had no constitutional protection. This is doubly true, because she expressly waived any right to disclose.

(c) waiver of First Amendment rights by pledging confidentiality

Yet even if Booher had some First Amendment right to tell about what she and her husband did to their daughter, she certainly waived that right by pledging not to disclose the information. First Amendment rights can be waived. *Rust v. Sullivan*, 111 S.Ct. 1759, 1775 (1991). They can, specifically, be waived by a pledge of confidentiality, as this Court held in *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2519 (1991). A news source sued a newspaper for breaking the promise to conceal his identity. Despite the public interest served by revealing the source's identity, this Court concluded that if there has been an agreement of confidentiality, "any restrictions which may be placed on the publication of truthful information are self-imposed." The press had no constitutional right to disregard promises enforceable under state law. *Id.*

Petitioner testified that just such pledges existed in this case. Her testimony must be accepted as true for the purposes of a summary judgment. Booher promised to keep the secret, and specifically agreed that she would not appear on the Donahue show. She had no First Amendment right to break that promise.[1]

3. The Texas court erroneously conflated Booher's supposed rights with Donahue's First Amendment claim, creating an unlimited privilege.

Petitioners have shown that Booher and Donahue had quite different protections under the First Amendment. If Booher had publicized her allegations without any help from Donahue, she would have had no constitutional protection at all. On the other hand, Donahue does have a First Amendment right to be considered. But the Texas court never analyzed Donahue's rights. It wrongly assumed that Booher's alleged right to disclose settled the case. Therefore the court did not decide, for example, whether the broadcast was newsworthy because, it said, "we do not believe that the issue of newsworthiness ... is relevant to the ultimate inquiry before us: whether Booher had the right to reveal her own identity." 857 S.W.2d at 705.

Donahue is liable for quite different reasons. Even if Booher had a right to disclose, Donahue would not necessarily have the right to broadcast her disclosure to millions of people. Donahue's rights are subject to the tests

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[1] Incidentally, the existence of the confidentiality agreement and related waiver is alone sufficient to distinguish the two cases relied upon by the Texas court, *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285 (D.D.C. 1981). Nothing in either of these opinions suggests that the discloser had expressly agreed to keep the matters secret and then violated the pledge.

under *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), discussed below.

Petitioners only pause here to call the Court's attention to the extraordinary result of fusing Booher's supposed rights with those of Donahue. A new and extremely broad First Amendment privilege has been created. Since Booher's identity was coupled with an account of her "personal" experience, and since all this was thereby privileged, the court creates an unlimited First Amendment right to disclose anything one has personally learned or experienced. Then it considers any question of press rights disposed of by the discloser's right. Thus the court apparently holds that any disclosure of any firsthand knowledge about anyone can be published with full First Amendment immunity for both discloser and publisher.

B. The Effect of the Texas Court's Decision Is Unlimited.

This reading of the nominal scope of the Texas court's decision is reinforced by consideration of its practical effect. The right to disclose is being given to one of the victimizers, not the victim. The only other test, "public concern," is defined in a way that will be met in every conceivable case.

1. The disclosure right was granted to a victimizer, not the victim.

If criminals have a First Amendment right to disclose how they harmed their victims, then the right of disclosure has no discernible boundary. Though the court called Booher one of the "victims of the family tragedy of incest," 857 S.W.2d at 705, the law is less generous. The acts done to the daughter by her stepfather were more than a tragedy; they were felonies, chargeable as rape, carnal abuse, or

incest, under the Arkansas law defining those offense in 1972. See *Ark. Stat.* § 41-811 & 41-812 (incest), 41-3401 (rape), 41-3406 (carnal abuse) (Bobbs Merrill 1964, repealed 1975); *Allen v. State*, 488 S.W.2d 712 (Ark. 1973); *Hicks v. State*, 243 S.W.2d 372 (Ark. 1951).

Booher was an accessory after the fact to these crimes. Despite her legal duty to protect her daughter, she joined in concealing the offense from the authorities. Both in 1972 and now, accessories after the fact were and are punished in Arkansas. Given the seriousness of the offenses being concealed, Booher could conceivably have been charged with a felony. See *Ark. Stat.* § 41-3404 (accessories "before or after the fact to the crime of rape"), 41-120 (accessory after the fact) (Bobbs Merrill 1964, repealed 1975); see also current *Ark. Code Ann.* § 5-54-105 (hindering apprehension or prosecution) (Michie 1993); *Tyler v. State*, 581 S.W.2d 328, 332 (Ark. 1979) (en banc) (discussing both previous and current law).

There was a real victim of these crimes, and it was Nancy Anonsen. As Booher sought revenge against her ex-husband and a book contract, Nancy became the victim yet again, but her agony this time was shared by her son. Giving Booher a First Amendment privilege to reinjure her victim places no sensible limit on the privilege, and it is unconscionable.

2. The definition of "public concern" is circular and unbounded.

The Texas court held that Booher's disclosure was constitutionally protected because the "show's general subjects, incest, rape" were newsworthy. 857 S.W.2d at 704. It then held that the newsworthiness privilege might not cover the specific information identifying petitioners, but this was irrelevant because Booher had an unlimited constitutional right to disclose information about her experiences.

Petitioners have already addressed the issue of Booher's supposed rights. To show why the Texas court's privilege is in practice absolute, we simply add here that the first part of its test, the finding of interest in the general subject will be met in every single case.

First, the Texas court comments that "the privilege to discuss matters of public interest extends to information concerning interesting phases of human activity." 857 S.W.2d at 703. Second, the opinion leaves no doubt that if the activity was not interesting, it would not be in the media. So the definition is circular. We can see the topic was interesting, because it was in the press or on TV. Donahue, like much of the media, believes it only broadcasts about topics that are or should be interesting. Rape is interesting. So are pregnancies. So is AIDS, and it would be interesting to hear which people are actually HIV-positive. There is definite interest in the secret details of the out-of-court settlement of a big lawsuit, or what some criminal defendant might have confided to his attorney.

This syllogism becomes a serious problem for this Court because the Texas court's opinion uses it as the First Amendment umbrella for Booher's unlimited disclosure right. Major premise: discussion of all topics of public interest is constitutionally protected. Minor premise: Booher disclosed on a topic of public interest. Conclusion: Booher's speech is constitutionally protected. Since we see that the major premise, the umbrella, covers practically any imaginable topic, the constitutional privilege extends to practically any disclosure.

We are thus presented with the very danger Judge Merrill warned of in *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976):

> To hold that privilege extends to all true statements would seem to deny the existence of 'private' facts, for if facts be facts -- that is, if they be true -- they

> would not (at least to the press) be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by law but on the taste and discretion of the press. We cannot accept this result.

527 F.2d at 1128.

The Texas decision creates, both on its face and in practical effect, an absolute First Amendment privilege that would practically eliminate not only the tort of public disclosure of private facts, but also cut a swath through many other common law torts, such as breach of confidentiality, and limit a broad array of oft-used government and judicial powers to regulate disclosure of private information.

C. This Court Has Expressly Rejected Such An Unlimited Privilege.

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) a Sheriff's Department posted the name of a rape victim who had just reported the crime in its press room. The newspaper ran the story in its police blotter section with the victim's name. Florida had a statute which made it unlawful to "print, publish, or broadcast" the name of the victim of a sexual offense. The victim sued the Sheriff's Department and the newspaper. The Department settled; the newspaper was found liable. The Supreme Court ultimately reversed the finding, holding that the newspaper's action was protected by the First Amendment.

This Court began by admitting that its prior decisions had not "exhaustively considered" the conflict between reporting of truthful information and protections of privacy, a "somewhat uncharted" area of the law. 491 U.S. at 530, 530 n.5. Appellant Florida Star urged the court to base its holding on *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) and hold that the press may never be punished for publishing

the truth. Appellee B.J.F. asked the court for an equally categorical ruling, that publishing the name of a rape victim could never enjoy constitutional protection. This Court declined both invitations.

Instead this Court chose to follow *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and adopt a narrower holding which would acknowledge the ongoing need to balance First Amendment interests with those of privacy. "We continue to believe that the sensitivity and significance of the clashes presented in clashes between First Amendment rights and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." 491 U.S. at 533.

This Court took care not to "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these [privacy] interests as to satisfy the *Daily Mail* standard." 491 U.S. at 537. This Court warned other courts that, "Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual ...." 491 U.S. at 541. Other courts heard the warning. "The Court [in *Florida Star*] expressly recognized that individuals maintain a privacy interest even in true facts that must be weighed against the societal interest in free expression." *Reuber v. Food Chemical News*, 899 F.2d 271, 285 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2814 (1991).

But the Texas court, by giving the discloser an unlimited constitutional right, by allowing victimizers as well as victims to claim this right, and by treating the discloser's right as dispositive for the broadcaster as identical, has fashioned just the sweeping holding this Court warned against. It is difficult to imagine how, in practice, any significant zone of personal privacy can remain protected against such a privilege.

The Texas court did not apply the tests offered by this Court in *Florida Star*. Indeed, the Texas court did not even cite this Court's decision.

The dissenters in *Florida Star* pronounced that, "Today, we hit the bottom of the slippery slope." 491 U.S. at 547 (White, J., dissenting). Unfortunately, they were wrong. New depths have been dredged. This case is an illustration of how the media organization can fail the tests elaborated in *Florida Star*.

II. NONE OF THE *FLORIDA STAR* TESTS WERE PASSED BY BOOHER AND DONAHUE.

Florida Star v. B.J.F. bases its holding on the *Daily Mail* principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533. For the press conduct, this Court itemized three considerations in applying this principle, along with a separate examination of the state interest.

Petitioners will examine each of these three considerations, and the way in which the state interest was tailored to the problem. This Court has implied that *all three* of these tests must be passed by the publisher. Otherwise the *Daily Mail* principle would need to be amended. In this case, none of them were passed by Donahue or Booher.

A. The Information Was Not Lawfully Acquired.

"First," the principle only protects the publication of information which has been "lawfully obtained." 491 U.S. at 534. This includes the question of consent, so critical to this case. "To the extent sensitive information rests in private hands, the government may under some

circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.*

1. Booher's disclosure to Donahue was unlawful.

Booher's disclosure to Donahue unlawfully breached a legal duty owed to petitioners, both in general and because of her express pledge of confidentiality. The common law tort of invasion of privacy through disclosure of private facts had long been recognized in Texas. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682-84 (Tex. 1976). Texas also recognizes the tort of intentional infliction of emotional distress through speech. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942-44 (Tex. Ct. App., 1985). *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 652-54 (Tex. 1987). Publicity is an element of the invasion of privacy tort, but the unlawful conduct was complete by Booher's actions alone, before Donahue broadcast her disclosure, both because the publicity was foreseeable and because (unlike defamation) publicity can be accomplished without publication. *Industrial Foundation*, 540 S.W.2d at 683.

2. Donahue's acquisition of the information was "nonconsensual."

As noted above, this Court expressly flagged the danger to a publisher of "nonconsensual acquisition" of information in private hands. Donahue did not obtain, or attempt to obtain, petitioners consent for the broadcast of Booher's disclosure. This was a violation of his own practice for invariably obtaining the rape victim's consent before disclosing the victim's identity.

Donahue may now argue, though, that he had Booher's consent. It was immaterial. Booher's privacy was not in need of protection.

In *Florida Star* the victim voluntarily disclosed the offense to the government. The government then disclosed the information to the press. But here, Booher was not telling the story of a crime committed against her. She was telling the story of a crime committed, many years earlier, against her daughter, a crime which she helped conceal.

When this Court referred to "nonconsensual acquisition," it can only have been writing of the consent of those with the expectation of privacy, the persons whose privacy interests the law seeks to protect. In this case, they are petitioners, not Booher. "In an organized society, there are few facts that are not at one time or another divulged to another ... information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons; not freely available to the public.'" *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749, 763-64 (1989)(quoting Webster's Third New International Dictionary). It would be odd indeed to find, in this case, that the victim's expectation of privacy can be waived by one of the victimizers.

B. The Information Was Not Publicly Available.

A second consideration in *Florida Star* was that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." 491 U.S. at 535. In *Florida Star* the government had "made certain information publicly available." *Id.* That was not the case here (or in *Reuber v. Food Chemical News*, 899 F.2d at 285).

The term "publicly available" is relatively narrow. It does not, for instance, include depositions in a judicial

proceeding. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984). Yet the facts here do not require the drawing of fine lines. No one ever reported the rape of 11 year-old Nancy Anonsen to public authorities, in 1972 or later. It was never a matter of public record.

C. The Public Interest Against "Timidity and Self-Censorship" Was Not At Risk.

"A third and final consideration is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Florida Star*, 491 U.S. at 535. The application of this test in *Florida Star* can readily be distinguished from the facts of this case. Since the disclosure came from the government, this Court wanted to let the media rely on the government and not have to sift through public reports to "prune out material arguably unlawful for publication." 491 U.S. at 536. That situation is obviously not presented here. But there are three additional reasons why the public interest which properly concerned the Court was not at risk in this case.

1. Identification of the victim, who was not a public figure, had no "public significance."

The crime cannot be said to have retained "public significance" by 1988, "in the sense in which the *Daily Mail* synthesis of prior cases used that term." *Florida Star*, 491 U.S. at 536. This Court defined the term precisely: "That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation of a violent crime which had been reported to authorities." *Id.*

In this case, no crime had been reported to authorities. None was being investigated. No investigation

was possible; the statute of limitations had expired in 1975. For offenses committed in Arkansas before 1976, when a new code was adopted, the statute of limitations for all felonies except murder was three years. *Ark. Stat.* § 43-1602 (Bobbs Merrill 1964, repealed 1975).

2. Despite some overlap, the contours of constitutional interests in newsworthiness are not synonymous with "ratingsworthiness" and "infotainment."

The *Florida Star* holding, by following *Daily Mail* rather than *Cox Broadcasting*, no longer treats the First Amendment question in private facts cases simply as a definition of the "newsworthiness" privilege. "Newsworthiness" remains an important factor, however, in evaluating the Court's required inquiry into the risk of "timidity and self-censorship" presented by the punishment of media behavior.

The Donahue show is not a news program produced by a news organization. Donahue and his corporate employers are in the business of providing a product which mixes information with entertainment. This does not mean Donahue has no First Amendment rights. He does. But his producers and editors are not applying the criteria of "newsworthiness" to their product. They are applying other criteria, which may overlap with "newsworthiness" but are not identical with it. Therefore the First Amendment interests at issue in this case must be evaluated with special care.

The traditional rule has been that newsworthiness ends and liability begins when the "publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake...." Restatement (Second) of the Law of Torts, § 652D, comment h (1977). It is hard to imagine any case offering a better example of "morbid and sensational

prying into private lives for its own sake" than this one. Booher detailed the long-past incestuous rape of her daughter; a caption ran underneath highlighting "Daughter Had Husband's Baby," all on a program with the topic of "Forbidden Pregnancies." For even milder examples held liable or sent to the jury, see, e.g., *Virgil v. Time Inc.* 527 F.2d at 1128 (profile of body surfer); *Huskey v. NBC*, 632 F.Supp. 1282, 1289 (N.D. Ill. 1986)(film showing man's tattoo); *McCabe v. Village Voice, Inc.*, 550 F.Supp. 525, 529-30 (E.D. Pa. 1982)(nude photo without consent); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 771-73 (Cal. Ct. App. 1983)(local college president's sex-change operation).

Newsworthiness is clearly not synonymous with omnipresent public interest. In *Reuber v. Food Chemical News*, the court found some legitimate public interest in the subject of a letter circulated about Reuber, on the quality of his cancer research. But the privacy interest was strong enough to require that the issue of liability be given to the jury. 899 F.2d at 284-85. Another case decided after this Court's holding in *Florida Star* was *Y.G. v. Jewish Hospital*, 795 S.W.2d 488 (Mo. Ct. App. 1990). The hospital was sued for disclosing information about plaintiffs' in vitro fertilization. Despite acknowledging undeniable public interest in the subject, the court considered sexual, procreative, and medical treatment matters essentially private and considered then not to be newsworthy if (a) they were not the subject of a legal action or activity of police or other public officials; or (b) did not occur in public view. The disclosure was held not newsworthy as a matter of law. 795 S.W.2d at 499-501.

The danger of "timidity and self-censorship" is especially reduced in this case because Donahue could have avoided liability and still let Booher talk about her daughter. He had the option of concealing Booher's identity. He

admitted in his deposition that he had often used this practice in the past, and said that such stories could still move him and his audience to tears.

Donahue also cannot claim that by disclosing a victim's identity against her will, he was doing a public service. Aside from studies showing that most public disclosures of rape victim identity reinforce rather than dispel sexual assault stereotypes, the fundamental question is "why must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society...?" Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 *S.Calif.L.Rev.* 1019, 1033 (1991). Eighty-four percent of the American public agreed in a survey that the identity of rape victims should be kept out of news stories unless the victim agrees to disclosure. *Id.* at 1034.

If Donahue is held liable for cavalierly damaging this victim's life and the life of her child, when identifying her was little more than "morbid and sensitive prying," there is no risk of inducing "timidity." The opposite danger is far greater. If the Constitution immunizes Donahue from accountability for such conduct, the standard for proper press behavior is redefined and lowered.

Traditional news organizations, competing against "infotainment," are already fighting the temptation to lower their ethical standards for finding and presenting news. As the managing editor and co-anchor of CBS Evening News and anchor of its "48 Hours" program recently wrote (discussing checkbook journalism):

> Part of the allure of lowered standards is the success of the syndicated magazine shows. They're sensationalized, dramatized, Hollywoodized. They also cost little and perform well in the ratings. These shows don't apply traditional hard-news standards ... I doubt most even think about hard-news standards.

> Too many of us in hard news, with the wolf at the door and the bean counter's breath down our necks, are looking for that extra tenth of a ratings point, envying the success of the syndicated magazines. ... If we keep blurring the distinctions and standards between news and entertainment, we're all going to have to pay.

Dan Rather, *Letter to the Editor*, N.Y. Times, March 8, 1994, at A20.

3. This common law action presents a different "state action" problem than the statutory prohibitions at issue in *Florida Star* and *Daily Mail*.

The risk of inducing "timidity and self-censorship" is further minimized in this case because the Court is not being asked to uphold a categorical statutory prohibition. Instead the Court is asked only to sustain the application of common law legal duties where the individuals involved define the circumstances of their liability. In *Cohen v. Cowles Media Corp.* this Court distinguished *Florida Star* and *Daily Mail* by observing that in those cases "the State itself defined the content of publications that will trigger liability. ... Here, by contrast, Minnesota law simply requires those making promises to keep them." 111 S.Ct. at 2519; see also *McSurely v. McClellan*, 753 F.2d 88, 112 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985)(upholding common law invasion of privacy action against congressional investigators).

D. Petitioners Fully Satisfied The Court's (and Justice Scalia's) Tests for Tailoring the Protection of State Interests.

Even if the press conduct had met the three tests which flow from the *Daily Mail* principle, this Court also acknowledged there could be a need to balance constitutional interests in free expression with "a need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533. It is "undeniable" that the interests underlying protections for victims of sexual offenses "are highly significant interests." *Florida Star*, 491 U.S. at 537. But the statute at issue in *Florida Star* was not properly tailored to protect these interests while respecting First Amendment concerns, for three reasons, none of which are present here.

1. The information was not disclosed by the government.

This Court, in *Florida Star*, was strongly influenced by the fact that the government had disclosed the information and now sought to punish its publication. The government, the Court noted, could have simply restricted the dissemination of the information. 491 U.S. at 538. In this case neither the government nor petitioners were responsible for the disclosure.

2. The tort does not create negligence per se.

The Florida law was faulted for "the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from" the statute. This Court expressly held that the common law approach was preferable, because it evaluated each case on its individual merits. "Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on [the Florida law] require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly

offensive." 491 U.S. at 539.

3. The tort does not suffer from the "facial underinclusiveness" of the Florida statute.

The final objection to the way in which Florida was protecting its state interests was the "facial underinclusiveness" of the statute. It punished the disclosure of identity of an "instrument of mass communication" but did not punish disclosures by other means. "An individual who maliciously spreads word of the identity of a rape victim is thus not covered" although the consequences could be "equally devastating." 491 U.S. at 540.

This "underinclusiveness" was the sole ground for Justice Scalia's concurrence in the decision of the Court in *Florida Star*. He concluded that "the law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself." 491 U.S. at 541-42 (Scalia, J., concurring).

This case obviously avoids the "underinclusiveness" problem by relying on the common law cause of action. The tort applies to individual disclosures as well as mass media outlets. Suit in this case was brought against both the private discloser, Booher, and those who broadcasted her disclosure. See also *Capital Cities/ABC, Inc. v. Brady*, 740 F.Supp. 1007, 1013 (S.D.N.Y. 1990).

III. COUNTERVAILING CONSTITUTIONAL AND PUBLIC INTERESTS WERE OVERLOOKED, NOT BALANCED.

In fashioning a First Amendment privilege in this area, as the Texas court has done, the interests on each side need to be carefully balanced. "We have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater

protection under the particular circumstances presented." *Daily Mail*, 443 U.S. at 106 (Rehnquist, C.J., concurring); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). But, as argued above, the Texas court's holding is categorical and unqualified.

A. The Texas Court's Absolute Privilege Abridges the Constitutional Right to Privacy.

This Court has recognized a constitutional interest as well as a public policy interest in protecting the right to privacy. See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 766-67 (1986); *Whalen v. Roe*, 429 U.S. 589, 599-600, 605-06 (1977). The privacy right probably flows from the protection of liberty in the Due Process Clause, reinforced by the common law tradition recognizing such a right as a dimension of substantive due process. *Burnham v. Superior Court*, 110 S.Ct. 2105, 2115 (1990)(plurality); *Cruzan v. Dir., Missouri Dept. of Health*, 110 S.Ct. 2841, 2852-53 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989). The First Amendment's right of association also protects "intimate human relations" from public inquiry. *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987).

The Texas court's privilege would grant constitutional immunity for publicizing any disclosure of private facts by a person who can claim to be describing their own experiences or personal knowledge. As mentioned earlier, the Texas court's definition of "public concern" makes it practically unlimited. There is no requirement that constitutionally protected privacy interests be weighed in the balance. Therefore the Texas court uses state authority to shield the abridgment of other constitutional rights. It would be curious if the Constitution could be stretched to hold, on the one hand, that it is unconstitutional to publicize a

person's private, traumatic, reproductive choice, *Thornburgh v. Am. Coll.*, while holding, on the other hand, that it is unconstitutional to punish those who publicize a person's private, traumatic, reproductive experience.

B. This Absolute Privilege Also Harms Other Important Public Interests.

In addition to the constitutional interests at stake, conferring such unlimited immunity to disclosers and publishers would injure important public interests. There are, of course, the interests every individual has in privacy. The protection of some private space in the life of each citizen, especially those who have never sought the limelight of public life, is both valuable to all and a constant point of distinction between democracies and tyrannies. "Social tyranny" can indeed be "more formidable than many kinds of political oppression, since ... it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself." John Stuart Mill, *On Liberty* (1849), reprinted in *The Utilitarians* 478-79 (1961).

With the disclosure and publication of private facts, "the wrong is found in the fact that 'a private life has been transformed into a public spectacle.' ... invoking "the essential core of the right to privacy." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *Calif.L.Rev.* 772, 839 (1985). The usual compensatory remedies are inadequate and "unlike virtually all other areas of communication, more speech or information can never rectify the wrong." *Id.*, 840. Privacy actions must therefore deter disclosers and the media to have their effect, and the courts must then balance the individual and collective interests at stake. "The danger of *chilling* the media may be no greater when privacy rather than reputation is at stake, but the societal price of insufficient *deterrence* may weigh more heavily in the privacy case." *Id.*, 843 (emphasis in original).

Other public interests are also at stake. Under the Texas court's holding, a lab technician might publicize his encounter with an AIDS case even if he knew that revealing his own identity would necessarily identify the victim of the disease. Compare, e.g., *Doe v. Borough of Barrington*, 729 F.Supp. 376, 382-85 (D.N.J. 1990)(disclosure of HIV status to neighbors justifies invasion of privacy action). Or, for another example: a professor appears on television to brag about the details of how he humiliated and sexually harassed his female student and, by revealing his identity, necessarily and foreseeably reveals hers. He and the broadcaster would be immune from suit.

Or the defendant in an ongoing legal action could appear on television and tell his story, even if the trial judge had imposed a gag rule on the parties. The legal duty embodied in the trial judge's order would have to yield to the constitutional right of disclosure established by the Texas court. Or, for another example, a plaintiff whose lawsuit was settled could go on Donahue and reveal just what he was paid. The general topic might be interesting; the plaintiff would only identify himself; and the plaintiff would be constitutionally protected from suit for violation of the nondisclosure agreement.

Many more illustrations can be offered for the broad reach of the Texas court's constitutional privilege, from trade secrets to family planning and abortion. In each case the discloser would ordinarily be bound by some legal duty not to reveal the truthful but private information. In each case the legal duty would give way before the constitutionally privileged disclosure. Beyond protection of the victims of sexual and parental abuse, there are many compelling public interests protected by the law's numerous restraints on the public disclosure of private facts. The decision of the Texas court did not balance any of these interests against those it sought to protect. This Court should.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID H. BERG
Counsel of Record
BERG & ANDROPHY
3704 Travis
Houston, TX 77002
713-524-5622

PHILIP D. ZELIKOW
79 J.F.K. Street
Cambridge, MA 02138

Counsel for Petitioners

APPENDIX A

C.J. BENINATI
CLERK DISTRICT COURT
FILED
MAR 4 1991
GALVESTON COUNTY TEXAS
BY /s/ illegible
Deputy

NO. 89-CV-0297

NANCY ANONSEN and	§	
MICHAEL ANONSEN,	§	
Individually and	§	IN THE DISTRICT
as Next Friend of	§	COURT OF
WILLIAM BOOHER, JR.	§	
Plaintiffs,	§	
v.	§	
	§	GALVESTON COUNTY,
PHIL DONAHUE, MULT-	§	TEXAS
IMEDIA ENTERTAIN-	§	
MENT, INC., JOSE	§	
PRETLOW, KTRK-TV,	§	
INC. d/b/a KTRK TV,	§	56th JUDICIAL
and MIRIAM BOOHER,	§	DISTRICT
Defendants.	§	

JUDGMENT

BE IT REMEMBERED that on the 7th day of January, 1991 came on to be heard DEFENDANTS PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., JOSE PRETLOW, KTRK-TV, INC. D/B/A/ KTRK TV, AND MIRIAM BOOHER'S Motion for Summary Judgment and that after considering the Motion for Summary Judgment

and the attachments thereto, the briefs filed in support of the motion for summary judgment, the response filed to the motion for summary judgment and attachments thereto, the briefs filed by the Plaintiffs and arguments of counsel, the Court is of the opinion that Defendants' Motion for Summary Judgment should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that summary judgment be entered for and on behalf of Defendants and that Plaintiffs Nancy Anonsen, Michael Anonsen and William Booher, Jr. recover nothing by this action and that each party shall pay for costs incurred by each such party. All relief not specifically granted herein is denied.

ENTERED this 4th day of March , 1991.

/s/ illegible
JUDGE PRESIDING

APPENDIX B

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

COPY OF JUDGMENT

NANCY ANONSEN AND MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., APPELLANTS	Appeal from the 56th District Court, Galveston County, Texas. (Tr.Ct.No. 89CV0297). Opinion delivered by Chief Justice Oliver-Parrott, Justices Cohen and O'Connor also sitting.

NO. 01-91-00377-CV V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC.,d/b/a/ KTRK-TV, AND MIRIAM BOOHER, APPELLEES

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on January 7, 1991. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, **NANCY ANONSEN AND MICHAEL ANONSEN,**

INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., jointly and severally, pay the costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Oliver-Parrott, Justices Cohen and O'Connor.

Judgment entered JUN 03 1993 , 1993.

In The
Court of Appeals
For The
First District of Texas

No. 01-91-00377-CV

NANCY ANONSEN AND MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., Appellants

V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC. d/b/a KTRK-TV, AND MIRIAM BOOHER, Appellees

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On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 89CV0297

O P I N I O N

The question before the Court is whether a person's right to make public the most private details of their own life is limited when the information also reveals painful intimacies of other persons. We find that it is not.

On January 5, 1989, appellee, Miriam (Mickey) Booher appeared as a guest on the Phil Donahue Show, the subject matter of which was pregnancies resulting from incest

or rape. Booher told a nationwide audience the story of her husband's rape of her daughter from a previous marriage when the child was 11 years old. Booher also revealed that she had never reported the rape to authorities; that she had remained married to her husband for some 16 to 17 years after the incident; and that her 16-year old adopted son, who had been raised as her daughter's adopted half-brother, was actually her daughter's biological child. Although the names of Booher's husband, daughter, and grandson were not disclosed on the air, Booher used her own full name. From time to time the caption "Daughter Had Husband's Baby" appeared on the screen as Booher spoke.

As a result of the broadcast, appellants brought this suit against Booher and the other appellees, alleging invasion of privacy through the public disclosure of private facts and intentional and negligent infliction of emotional distress. Their complaint is that by disclosing her own identity, Booher effectively disclosed their identities as well, thus exposing the incestuous rape of Anonsen and the circumstances of her child's birth to a nationwide audience. The trial court granted summary judgment in favor of all defendants. Finding that Booher's right to publish her personal account of her family's tragedy is protected speech under the first amendment of the United States Constitution, we affirm.

Booher told the Donahue show audience that she had met her husband in Germany and moved to Arkansas with him and her six-year-old daughter, Nancy, whom he adopted. Sometime in 1972, Booher's husband raped Nancy, who was then 11 years old. Nancy became pregnant as a result and gave birth to a boy. Booher claimed that she did not know at the time that her husband was the child's father. Her husband insisted that they should give their daughter love and understanding and that they should adopt the child and raise

it as their own. Booher assented. It was not until five years later that Booher learned the real story of her daughter's pregnancy when, in anger, her husband revealed the truth.

Booher claimed that upon learning the truth, she ordered her husband to leave but reconciled with him shortly thereafter because of economic hardship. Booher told the viewers that she could neither read or write English, could obtain only menial jobs, and she feared for her welfare and the welfare of her children. In addition, at that time, Booher's daughter did not know that Booher had learned the truth about the rape, and her grandson/adopted son "loved his daddy." Maintaining physical separation in the same house, Booher and her husband continued to live together until her adopted son was 15 years old. At that time, the boy learned the truth about his parents, and, according to Booher, there was no longer a need for pretense. She and her husband, who was at all relevant times a police officer, separated formally and were divorced sometime thereafter.

Appellants acknowledge that the story told by Booher is true. In addition, they assert the following facts that led up to Booher's appearance on the Donahue show. After Booher's husband left her and filed for divorce in 1988, she wrote a letter about the rape and sent it to four nationally broadcast talk shows. Booher was motivated by revenge and the desire to sell a book about her life. Only Donahue's producer responded to the letter. No member of Donahue's staff ever contacted Anonsen or her son to verify Booher's story or to determine whether they consented to the broadcast.

In fact, Anonsen testified that she told her mother not to go on the Donahue show because "too many people will get hurt." Booher told Anonsen that she had canceled her plans to appear. Anonsen learned of her mother's

appearance from her husband. Plaintiff, Michael Anonsen saw the show when it was broadcast on **KTRK-TV**. William, Jr., who was 16 years old at the time, testified that he watched the show with his father. After the show, his high school classmates harassed him, calling him a "bastard." He had to transfer to another school to escape the harassment.

Until the Donahue broadcast, the story of Anonsen's rape and the truth about William, Jr.'s real parents had never been reported to the authorities, or made a part of any public record. Appellants maintain that the story had been revealed only to a few close friends and relatives.

For purposes of this opinion we will accept all appellant's factual assertions as true and look at the summary judgment proof in a light most favorable to them. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Without specifically so holding, the United States Supreme Court has indicated that the tort of invasion of privacy may encompass a cause of action for public disclosure of private facts, even if the facts are true. *See Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 487-91 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7(1967); *see also, Virgil v. Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975). The purpose of the tort is to protect the individual against unwarranted publication of private facts. However, the protection of the individual must be balanced with the privilege of the press to give publicity to matters of public interest that arise out of the desire and the right of the public to know what is going on in the world and the freedom of the press and other information agencies to report it. *See Times, Inc.*, 385 U.S. at 388; *see also generally*, Prosser and Keaton on Torts, (5th ed. 1984); RESTATEMENT (Second)

of Torts § 652 D & cmt. § 652 D (1989). While there generally can be no liability for publication of truthful information contained in official records open to public inspection, *Floyd v. Park Cities People, Inc.*, 685 S.W.2d 96, 97-98 (Tex. App.--Dallas 1985, no writ), a different standard may apply in cases where the facts revealed are not a matter of any public record. *See Cox Broadcasting Corp.*, 420 U.S. at 491.

To prevail in a common-law tort cause of action for invasion of privacy, a plaintiff must establish the following elements:

> (1) publicity was given to matters concerning the plaintiff's private life;
>
> (2) the matters made public would be highly offensive to a reasonable person of ordinary sensibilities;
>
> (3) the matters publicized were not of legitimate public concern.

Indus.Found. v. Texas Indus. Acc. Bd., 540 S.W.2d 668, 682 (Tex. 1976); *see also Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

The defendants, Booher, along with Multimedia Entertainment, Inc. and Multimedia, Inc., who produce the Donahue show; the show's host, Phil Donahue; Jose Pretlo, the producer of the show involving Booher; and KTRK, INC. d/b/a KTRK TV, the television channel that broadcast the show in the Houston-Galveston area (collectively, the "media defendants"), moved for summary judgment of the following grounds:

(1) The published facts concerning incest, sexual abuse, and acceptance and understanding of the victims of these crimes, were of legitimate concern to the public.

(2) No private facts were published to the public at large.

(3) Booher's personal revelations were protected under the first and fourteenth Amendments of the United States Constitution.

In addition to the grounds asserted by the other defendants, KTRK moved for summary judgment on the grounds that (1) it had no duty to prescreen the show because it was justified in relying on Metromedia's warranty that the show did not violate such rights, and (2) the nationwide broadcast of the show, three days before it was aired in the Houston-Galveston area, precluded an action against KTRK for public disclosure of private facts.

To obtain summary judgment, a defendant has the burden of establishing by competent summary judgment proof that, as a matter of law, there is no genuine issue of material fact as to one or more essential elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (828 (Tex. 1970). While the defendants' motion for summary judgment and the plaintiffs' response addressed all three elements of the privacy tort, as well as the plaintiffs' other causes of action, we find the analysis of the third element to be dispositive of the appeal.

It is the third element of the tort, i.e., the publicizing of matters not of legitimate public concern, that gives rise to a first amendment privilege, sometimes referred to as the

"newsworthiness defense," to publish or broadcast news or other matters of public interest. *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989); *Dresbach v. Doubleday & Co., Inc.*, 518 F.Supp. 1285, 1287 (D.D.C. 1981). The privilege to discuss matters of public interest extends to information concerning interesting phases of human activity and must embrace all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period. *Times, Inc.*, 385 U.S. at 388; *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). The privilege is broad and extends beyond subjects of political or public affairs to all matters of the kind customarily regarded as "news" and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published. *Virgil*, 527 F.2d at 1129.

> The risk of . . . exposure [of the individual to others] is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Time, Inc., 385 U.S. at 388.

Appellants assert that whether a subject is of legitimate public concern is a question of fact for a jury. Specifically, they contend that a jury should decide whether their identities were newsworthy so as to warrant revelation. We cannot agree, however, under the particular facts and circumstances of this case.

Whether the issue is a question of law or fact, there are two inquiries involved in a determination of whether Booher's revelations during her appearance on the Donahue show broadcast were protected by the first amendment; (1) whether the show's general subjects, incest, rape, and the children born of those crimes, were within the scope of the first amendment privilege; and if they were, (2) whether Mickey Booher's revelation of her own identity was also protected by the first amendment. *See Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989); *Times Mirror Co. v. Superior Court*, 244 Ca. Rptr. 556, 561-62 (Cal.Ct.App. 1988), *cert. denied*, 109 S.Ct. 862 (1989) (while the general subject matter of a publication may be newsworthy, it does not necessarily follow that all information given in the account is newsworthy.

In each case relied on by appellants, the court has no problem determining, as a matter of law, whether the general subject matter context of the published facts is newsworthy. In *Time, Inc.*, the Supreme Court had "no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest" within the scope of protection afforded by constitutional guarantees of speech and press. *Time, Inc.*,385 U.S. at 388. The court in *Hall v. Post*, 355 S.E.2d 819, 826 (N.C. Ct. App. 1987), held that the topic of adoption and its related issues are of "legitimate interest, in a general way, to the public." Likewise, in *Virgil*, the court conceded that "the privilege to publicize newsworthy matters would, as a matter of law, extend to the general subject of surfing." *Virgil*, 527 F.2d at 1131.

Like those courts before us, we have no doubt that, as a matter of law, the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding

and healing of those victims, are matters of legitimate public concern. It is the second part of the inquiry that sets the instant case apart from most of the cases relied on by the parties, both in the trial court below and in their exhaustive briefs on appeal.

While frequently deciding the newsworthiness of *general topics* as a matter of law, courts have acknowledged the possible existence of fact questions about the newsworthiness of the plaintiff's identity, or of private facts about the plaintiff, allegedly unrelated to those general topics. [1] It is those highly fact-specific issues that some courts have found might raise an issue for determination by a jury. *See Times Mirror Co.*, 244 Cal. Rptr. at 564 (whether the publication of a murder witness' name was newsworthy was a question of fact); *see also Virgil*, 527 F.2d at 1131 (whether private facts unrelated to the sport were of legitimate public interest in relation to an article on surfing was a question of fact). As the *Virgil* court succinctly put it, "the fact that [individuals] engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure." *Virgil*, 527 F.2d at 1131.

In those cases that address the newsworthiness of the plaintiff's identity, the identity of the plaintiff had been revealed by a third party who had no connection with the events other than to report them. *See, e.g., Cox*

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1. In *Hall*, the court found that the newsworthiness of the private facts published about the plaintiff's adoption, including the identities of the parties, was an issue on which reasonable minds could differ and should be decided by a jury. In addition, the court found a fact issue existed about whether some or all of the facts of the adoption were publicly known or were, in fact, private. *Hall*, 355 S.E.2d at 828.

Broadcasting Co., 420 U.S. at 473-74 (broadcasting company identified deceased rape victim during coverage of trial of alleged rapist. *Time, Inc.*, 385 U.S. at 374 (magazine reported that new play portrayed experience of plaintiff and his family who had been held hostage in their home by escaped convicts); *Hall*, 355 S.E.2d at 820 (newspaper revealed identity of adopted child and her adoptive and birth mothers in a story about the details of that particular adoption); *Ross*, 870 F.2d at 271 (TV documentary revealed rape victim's first name and showed photo of her residence in a program supporting the pardon of an allegedly wrongly convicted rapist); *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377 (Pa. Super. Ct. 1984) (newspaper published unrelated private facts about the family of a welfare applicant); *DeGregorio v. CBS, Inc.*, 473 N.Y.S.2d 922 (N.Y. 1984) (in a feature story about romance, broadcaster showed film of two hard hat workers holding hands on public street); *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (newspaper revealed that who saved President Ford from assassination was gay); *Hebert v. Roshto*, 439 So.2d 428 (La. 1983) (newspaper published a 25-year-old article containing details of criminal convictions for which plaintiffs had been pardoned); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr., 762 (Cal. Ct. App. 1983) (newspaper revealed that class president was a transsexual in a follow-up article to an unrelated story about class finances); *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981) (publisher revealed physician's name, photo, and psychiatric history in article about failure of medical profession to police its members).

We do not believe that the issue of newsworthiness of the parties' identities, whether a question of law or a question of fact, is relevant to the ultimate inquiry before us: whether Booher had the right to reveal *her own identity*.

In the present case, Booher, like her daughter and grandson, is herself one of the victims of the family tragedy of incest. Her reactions to that tragedy, the impact on her life of her daughter's rape, the birth of the child of that rape, whom she adopted and raised as her own, and her eventual discovery of the truth about her husband -- all comprise her story as well as that of the other family members. Therefore, we are unable to agree with appellants' contention that a jury should be allowed to determine whether Booher's voluntary, undisguised appearance on the Donahue show was no more than "morbid and sensational prying."

We find two cases especially persuasive in our analysis of Booher's right to reveal her identity in telling the story of her experience, thus making the identities of appellants ascertainable. In *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980), the plaintiff sued for invasion of privacy, complaining that private facts about her marriage were disclosed in an autobiography written by her husband's brother. As in the situation before us, the matters were not a part of any public record, nor, apparently, had they been widely publicized and thus rendered not private. The author revealed the facts in discussing the effect on his life of the marriage of his older brother, with whom he shared a very close relationship.

In *Campbell*, the trial court granted summary judgment for the author. The appellate court affirmed, holding that there is a first amendment privilege to publish truthful information of legitimate public concern, and the privilege encompasses dissemination of information relating to even individuals who have not sought or who have attempted to avoid publicity. *Campbell*, 614 F.2d at 397. The court observed that the privacy of such individuals is protected, however, by requiring that logical nexus exist between the identity of the individual and the matter of

legitimate public interest.[2] *Id.* The court then determined that the private facts of his brother's marriage, as they affected the author, had the requisite logical nexus to fall within the ambit of the constitutional protection. *Id.*

Likewise, in *Dresbach*, the plaintiff sued a book publisher and others for invasion of his privacy through their publication of a book about his brother's murder of their parents some 19 years earlier. Although the court acknowledged the absolute privilege accorded matters in the public record, it went on to decide the case on the grounds, specifically stating, "we must decide whether true matters in the book were matters of public interest at the time they were published and whether the inclusion of plaintiff in connection with those matters was legitimate, or whether the countervailing interest in plaintiff's privacy concerning those matters many years after the events renders the publication actionable." *Dresbach*, 518 F.Supp. at 1289-1290.

The court first determined that the subject matter of the book, the brother's past crime, his motivation, his prison experiences, his rehabilitation, and the support and lack of support extended by his friends and family, was a matter of legitimate public concern as a matter of law. *Dresbach*, 518 F.Supp. at 1290. Next, the court closely analyzed the disclosure of the plaintiff's identity under the logical nexus requirement articulated in *Campbell*. Based upon its analysis, the court concluded that the book could not have been written "without including private facts about the plaintiff's homelife which obviously was intimately bound up with his brother's homelife." *Id.* Unfortunately, appellants are in the same unenviable position in relation to Booher's life.

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2. It should be noted that the plaintiff in *Campbell* did not contend that the autobiography was without legitimate public interest.

Acknowledging the dangers of creating restrictions on the individual's right to self-expression, the court stated:

> [W]e tread on dangerous ground deciding exactly what matters are sufficiently relevant to a subject of legitimate public interest to be privileged. First Amendment values could obviously be threatened by the uncertainty such decisions could create for writers and publishers. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher . . . . Clearly here, where the important public issues of crime, the criminal justice system, and rehabilitation are concerned, the defendants have shown an adequate nexus between matters of legitimate public interest and the disclosures about the plaintiff to merit constitutional protection.

Dresbach, 518 F.Supp. at 1290-1291 (citations omitted).

In the context of their personal stories, which were undoubtedly theirs to tell, both Campbell's and Dresbach's revelations of private facts about others involved in their lives were protected by the first amendment. We find that Booher's rights are similarly protected. As appellees suggest, to hold otherwise would be to imply that one's autobiography must be written anonymously.

Like the court in *Dresbach*, we are not without compassion for appellants, who certainly have been victimized by the tragic events revealed on the Donahue program. We are further mindful that the protection of Booher's right to reveal her story and her identity imposes additional emotional suffering upon appellants. Sensitive

information which appellants have to some extent attempted to keep secret, has been given unwelcome publicity, causing them pain. Yet, we conclude that to allow a cause of action based upon Booher's truthful and undisguised account of her own and her family's experience is inconsistent with the first amendment. Freedom of speech would be severely compromised if discussions of matters of public interest were circumscribed in the manner advocated by appellants.

The summary judgment must, therefore, be affirmed.

/s/ Alice Oliver-Parrott
Alice Oliver-Parrott
Chief Justice

Justices Cohen and O'Connor also sitting.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered JUN 03 1993
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

APPENDIX C

(stamp illegible)

No. 01-91-0377-CV

APPLICATION OF WRIT OF ERROR TO
THE SUPREME COURT OF TEXAS

NANCY ANONSEN and MICHAEL ANONSEN
Individually and as Next Friends of WILLIAM
BOOHER, JR., a Minor

Petitioners

WRIT DENIED

V.

PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT,
INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC.
d/b/a KTRK TV, and MIRIAM BOOHER

Respondents

LIST OF NAMES OF PARTIES

The following individuals and entities have an interest in the subject matter of this case:

Ms. Nancy Anonsen
1003 19th Street
Galveston , Texas

Mr. Michael Anonsen
1003 19th Street
Galveston, Texas

Mr. William Booher, Jr.
1003 19th Street
Galveston, Texas
10017

Mr. Phil Donahue
30 Rockefeller Plaza
New York, New York

Multimedia,
Entertainment, Inc.
75 Rockefeller Plaza
Suite 827
New York, New York 10019

Multimedia, Inc.
75 Rockefeller Plaza
Suite 827
New York, New York
10019

Mr. Jose Pretlo
Multimedia Entertainment
30 Rockefeller Plaza
Suite 827
New York, New York 10017

KTRK, Inc. d/b/a
KTRK TV
3310 Bissonnet
Houston, Texas 77005

Ms. Miriam Booher
410 Prickett Road
Bryant, Arkansas 72022

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk
January 5, 1994

Mr. David Berg
Berg & Androphy
3704 Travis Street
Houston, TX 77002

Mr. James B. Galbraith
McLeod, Alexander,
Powel & Apffel, P.C.
P. O. Box 629
Galveston, TX
77553-0629

Mr. Kenneth J. Bower
McLeod Alexander
Powel & Apffel
802 Rosenberg
P. O. Box 629
Galveston, TX 77553-0629

Mr. Otto D. Hewitt,III
The Davenport Law Firm
1480 East Highway 6
Alvin, TX 77511

Mr. R. James George, Jr.
George, Donaldson & Ford
1000 Norwood Tower
114 W. 7th Street
Austin, TX 78701

Ms. Amy C. Wright
George, Donaldson &
Ford, L.L.P.
1000 Norwood Tower
114 W. 7th Street
Austin, TX 78701

Ms. Julie A. Ford
George, Donaldson
& Ford, L.L.P.
114 W. 7th St.
1000 Norwood Tower
Austin, TX 78701

RE: Case No. D-4138

Style: NANCY ANONSEN and MICHAEL ANONSEN, INDIVIDUALLY AND AS NEXT FRIENDS OF WILLIAM BOOHER, JR., A MINOR v. PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLO, KTRK, INC. D/B/A KTRK

Dear Counsel:

Motion for rehearing of application for writ of error in the above referenced case was this day overruled.

Sincerely,

John T. Adams, Clerk

by /s/ illegible
Courtland Crocker
Deputy

41-120. Accessory after the fact.—An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime. [Rev. Stat., ch. 44, div. 3, art 8, § 3; C. & M. Dig., § 2310; Pope's Dig., § 2936.]

41-811. Incest defined.—Persons marrying, who are within the degrees of consanguinity within which marriages are declared by law to be incestuous, or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest. [Rev. Stat., ch. 44, div. 4, art 7, § 5; C. & M. Dig., § 2628; Pope's Dig., § 3318.]

41-812 Penalty for incest.— Whoever shall be convicted of incest shall be imprisoned in the penitentiary for a period not less than three [3] nor more than ten [10] years. [Act Dec. 17, 1838, § 4 (2nd sent.), p. 121; C. & M. Dig., § 2629; Pope's Dig., § 3319.]

41-3404. Accessory to rape. —Accessories before or after the fact to the crime of rape shall be punished by imprisonment in the penitentiary for a period of not less than five [5] years nor more than twenty-one [21] years. [Act Dec. 17, 1838, § 4 (1st sent.,clause 2), § 10 (3rd & 4th sent.), p. 121; C & M Dig., § 2312; Pope's Dig., § 2938.]

41-3406. Carnal abuse—Penalty.—Every person convicted of carnally knowing, or abusing unlawfully, any female person under the age of sixteen [16] years, shall be imprisoned in the penitentiary for a period of not less than one [1] year nor more than twenty-one [21] years. [Act Feb. 13, 1899, No. 12, § 1, p. 10; C & M Dig., § 2720; Pope's Dig., § 3406.]

43-1602. Felonies other than capital.—No person shall be prosecuted, tried, and punished for any other felony unless an indictment be found within three [3] years after the commission of the offense; Provided, that in cases of embezzlement of funds by an administrator, guardian, or curator the limitation shall not begin to run until an accounting has been had and such administrator, guardian, or curator has been ordered by a court of competent jurisdiction to pay over the funds and in other cases of embezzlement of trust funds the limitation shall not begin to run until the defalcation is discovered. [Rev. Stat., ch. 45, § 251; Acts 1923, No. 202, § 1, p. 176; C. & M. Dig., § 2886; Pope's Dig., § 3702.]